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THE
LAW OF COSTS
IN
CIVIL ACTIONS.

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1793
THE

Law of Costs

IN

CIVIL ACTIONS.

By WILLIAM TIDD,
Of the INNER TEMPLE.

L O N D O N :

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P R E F A C E.

THE following sheets were intended to have made part of the *Practice of the Court of King's Bench*: but the importance of the subject seeming to require a distinct investigation, the Author was induced to publish them in their present form.

In this treatise, he has briefly considered, in what cases the
parties

parties in a civil action are entitled to costs, what those costs are, and the means of taxing and recovering them, 1. as between party and party; and 2. as between attorney and client.

Short as the work is, the Author is not without his hopes, that it may be of some utility to the Profession.

Inner Temple,
Nov. 1792.

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Law of Costs.

IN the prosecution and defence of *civil* actions, for it is not my intention to treat of *criminal* proceedings, the parties are necessarily put to certain expences, or, as they are commonly called, *Costs*; consisting of money paid to the king, for fines and stamp-duties, to the officers of the court, and to the counsel and attornies, for their fees, &c.

These costs may be considered either as between *attorney* and *client*, being what are payable in every case to the attorney by his client, whether he ultimately succeed or not; or as between *party* and *party*, being those only which are allowed, in some particular cases, to

the party succeeding against his adversary. As between party and party, they are *interlocutory* or *final*; the former are given on various *interlocutory* motions and proceedings, in the course of the suit; the latter, of which I shall principally treat, are not allowed till the conclusion of it.

Of the *plaintiff's* costs at common law, and by the statute of Gloucester.

No costs were recoverable by the plaintiff or defendant at common law^a. But by the statute of Gloucester, (6 Edw. 1.) c. 1. § 2. it is provided, “that the demandant may recover against the tenant the costs of his *writ* purchased (which, by a liberal interpretation, has been construed to extend to the *whole* costs of his suit^b), together with the damages given by that statute; and that this act shall hold place, in all cases where a man recovers damages.” This was the origin of costs *de incremento*^c. And hence the plaintiff has, generally speaking, a right to costs, in all cases where he was entitled to

^a 2 Inst. 288. Hardr. 152.

^b 2 Inst. 288.

^c Gilb. Eq. Rep. 195.

damages,

damages, antecedent to, or by the provisions of, the statute of Gloucester^d; as in *assumpsit*, covenant, debt on contract, case, trespass, replevin, ejectment, &c.; or where, by a subsequent statute, *double* or *treble* damages are given, in a case where *single* damages were before recoverable^e; as upon the 2 Hen. 4. c. 11. for suing in the admiralty court^f, upon the 8 Hen. 6. c. 9. for a forcible entry^g, or upon the 2 & 3 W. & M. sess. 1. c. 5. for rescuing a distress for rent^h. And he has also a right to costs, in all cases where a certain *penalty* is given by statute to the party grievedⁱ; for otherwise the remedy might prove inadequate.

But the statute of Gloucester did not extend to cases where *no* damages were

^d 10 Co. 116. a. ^e *Id.* 2 Inst. 289. Cowp. 368.

^f 10 Co. 116. a. b. Dyer, 159. b. Carth. 297.

^g 10 Co. 115. b. Co. Lit. 257. b. 2 Inst. 289. Cro. El. 582.

^h Carth. 321. 1 Salk. 205. 1 Ld. Raym. 19. Skin. 555. Holt, 172. S. C.

ⁱ Cro. Car. 560. 1 Roll. Abr. 574. Skin. 363. Carth. 230. 1 Salk. 206. 1 Ld. Raym. 172. Say. Costs, 11. H. Black. 10.

recoverable at common law, as in *scire facias*, *prohibition*^k, &c.; nor where *double* or *treble* damages were given by a subsequent statute, in a new case where *single* damages were not before recoverable; as in *waste* against tenant for life or years^l, upon the statute of Gloucester, (6 Edw. 1.) c. 5; for not setting out tithes^m, upon the 2 & 3 Edw. 6. c. 13; or for driving a distress out of the hundredⁿ, upon the 1 & 2 Ph & M. c. 12. Nor does this statute extend to *popular* actions, where the whole or part of a penalty is given by statute to a common informer^o; as, upon the 5 Eliz. c. 4. § 31. for exercising a trade, without having served an apprenticeship; or upon the statute of usury, 12 Ann. stat. 2. c. 16. In these and such like cases, therefore,

^k Comb. 20.

^l 2 Hen. 4. 17. 9 Hen. 6. 66. b. 10 Co. 116. b.
2 Inst. 289.

^m Moor, 915. Noy, 136. Hardr. 152.

ⁿ 2 Inst. 289. Dyer, 177. But see Cro. Car. 560.
1 Roll. Abr. 574.

^o 1 Roll. Abr. 574. 1 Vent. 133. Carth. 231.
1 Salk. 206. 1 Ld. Raym. 172. Cas. Pr. C. B. 87.
Barnes, 124. S. C. Cowp. 366. H. Black. 10.
B. N. P. 333.

the plaintiff is not entitled to costs, unless they are expressly given him by the statute; but wherever they are so given, he is of course entitled to them.

Where *single* damages are given by a statute, subsequent to the statute of Gloucester, in a new case wherein no damages were previously recoverable, it has been doubted whether the plaintiff shall recover costs, if they are not mentioned in the statute. The rule in *Pilfold's* case is, that he shall not^p; and accordingly it is holden, that he is not entitled to costs in *quare impedit*^q, wherein damages are given by the statute of Westm. 2. (13 Edw. 1.) c. 5. § 3. But the rule in *Pilfold's* case is contradicted by lord *Coke* himself^r, who says, that “this clause (respecting the statute of Gloucester’s holding place, in all cases where a man recovers damages) doth extend to give costs, where damages are

^p 10 Co. 116. a.

^q 2 Hen. 4. 17. 27 Hen. 6. 10. 10 Co. 116. a.
² Inst. 289. 362. Barnes, 140. And see Cro. Car. 360.
 Carth. 231. Cowp. 367, 8. ^r 2 Inst. 289.

given to any demandant or plaintiff, in any action, by any statute made *after* this parliament." And the rule has been since narrowed, by several modern decisions; from whence it may be collected, that the plaintiff is entitled to costs, in all cases where single damages are given by statute to the party grieved^s, although costs are not particularly mentioned in the statute.

Of the costs
in *waste*,
debt for not
setting out
tithes, *scire*
facias, and
prohibition.

In several of the foregoing cases, wherein costs were not recoverable by the plaintiff at common law, they are expressly given him by the statute 8 & 9 W. 3. c. 11. by which it is enacted, that "in all actions of *waste*, and actions of debt upon the statute for not setting forth *tithes*, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles; and in all suits upon any writ or writs of *scire facias*, and suits upon *prohibitions*, the

^s 2 Will. 91. Barnes, 151. S. C. 3 Bur. 1723.
1 T. R. 71. But see the opinion of *Aston*, Just. cont.
Cowp. 367, 8.

plaintiff

plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit.*"

Upon this statute there have been the following determinations:

In an action of debt for the *penalty* of the statute 2 & 3 Edw. 6. c. 13. for not setting out tithes, with a count for the *single* value, after a demurrer to the declaration the parties submitted to arbitration, and the arbitrator awarded the single value to be less than twenty nobles (6l. 13s. 4d.); the court held, that the plaintiff was not entitled to costs on the counts for the penalty, under the statute 8 & 9 W. 3. c. 11. the value not having been found by the jury; but

B 4

they

they allowed him to have the costs taxed, on the count for the single value^t.

In *Scire facias*, the plaintiff is not entitled to costs, unless the defendant has appeared and pleaded: And no costs are payable by the plaintiff, on moving to quash his own writ before plea^u, nor after a plea in abatement^v.

In *Prohibition*, the rule is, that the plaintiff, succeeding after plea pleaded or demurrer joined, ought to have his costs from the time of the suggestion, or first motion for a prohibition, and all costs incident and subsequent thereto^w. And where the defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, the court held this not to be a plea within the statute, but a mere sham plea, and ordered the defendant to pay

^t H. Black. 107. And see Barnes, 150.

^u Caf. Pr. C. B. 74.

^v 1 Str. 638.

^w Caf. Pr. C. B. 11. 1 Str. 82. 2 Str. 1062.

the plaintiff's costs of the proceedings in prohibition^x. Where the defendant in prohibition lets judgment go by default, the plaintiff is entitled, by the common law, to a writ to inquire of his *damages*, for the contempt in proceeding after the prohibition delivered; and, of consequence, by the statute of Gloucester, to his *costs*^y. In this case, however, the plaintiff is only entitled to costs, from the time that the rule for a prohibition was made absolute, as the defendant could not possibly be in contempt before^z. And where the plaintiff was nonsuited, it was holden, that the defendant ought only to have the costs of the nonsuit, and not what were incurred by opposing the rule to shew cause, why the writ of prohibition should not be granted^a. If judgment be given for the plaintiff, as to *part* of what is in issue, he is entitled to costs, although a consultation be granted as to the residue^b. And, in like manner, if the defendant

^x Barnes, 148.

^y Caf. Pr. C. B. 20.

^a Say. Costs, 137.

^z Id. 21.

^b 2 Str. 1062, 3.

prevail

prevail as to *part*, he is entitled to costs ^c. But it seems, that if the defendant succeed upon demurrer, he is not entitled to costs ^d, this being a *casus omissus* out of the statute. There is a proviso in the statute ^e, that it shall not extend to executors or administrators; and hence it has been determined, that in *scire facias* ^f or *prohibition* ^g, they are not liable, when plaintiffs, to the payment of costs.

Of the statutes restraining the plaintiff's right to costs.

The plaintiff's general right to costs being thus settled and established, upon the footing of the statute of Gloucester, has been since altered, restrained, and modified, by subsequent statutes. The first statute that restrained the plaintiff's right to costs, was the 43 Eliz. c. 6. (extended to *Wales*, and the counties *palatine*, by the 11 & 12 W. 3. c. 9.); by which it is enacted, that "if in any personal action, to be brought in any of her majesty's courts of Westminster, not being for any

^c Barnes, 138, 139.

^d *Brymer and Atkins*, H. 29 G. 3. C. B.

^e § 5.

^f 1 Str. 188.

^g *Caf. Pr. C. B.* 158. *Pr. Reg.* 118. Barnes, 127. 129. S. C.

title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and be so signified by the justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to the sum of forty shillings, that in every such case the judges or justices, before whom such action shall be pursued, shall not award to the plaintiff any more costs than the sum of the debt or damages so recovered shall amount to, but less at their discretion."

The intention of this statute was to confine trifling actions to inferior courts^h; and a certificate may be granted upon it, at any time after the trial of the causeⁱ. The first instance of a certificate being granted, upon this statute, was in the case of *White v. Smith*, E. 17 G. 2.; wherein *Willes* Ch. J. certified in an action for taking sand^k. And since that time, cer-

^h Gilb. Eq. Rep. 196.

ⁱ Say. Costs, 18. 3 T. R. 38. (*d*).

^k 2 Str. 1232. 1 Will. 93. S. C. 3 Will. 325.

tificates have been not infrequent¹. But as the judges, for a long time, were unwilling to certify upon this statute, thinking it hard to deprive a plaintiff of his right to costs, merely because he had resorted to a superior court, when perhaps he could not have obtained justice in an inferior one, the legislature was obliged to interpose its authority, still farther to guard against trifling and vexatious actions.

Of the court
of conscience
acts.

Thus, by the 3 Jac. 1. c. 15. § 4. it is enacted, that “ if in any action of debt, or action upon the case upon an *assumpsit* for the recovery of any debt, to be sued or prosecuted against any citizen and freeman of the city of *London*, or any other person, being a victualler, tradesman, or labouring man, inhabiting within the said city or the liberties thereof, in any of the king’s courts at Westminster, or elsewhere, out of the court of requests for the same city, it shall appear to the judge or judges of

¹ Id. Say. Rep. 250. 2 Will. 253. 3 T. R. 37.

the

the court where such action shall be sued or prosecuted, that the debt to be recovered by the plaintiff shall not amount to the sum of forty shillings, and the defendant shall duly prove, either by sufficient testimony or his own oath, that at the time of commencing such action, the defendant was inhabiting and resident in the city of *London* or the liberties thereof, the said judge or judges shall not allow to the plaintiff any costs of suit, but shall award the plaintiff to pay so much ordinary costs to the defendant, as the defendant shall justly prove, before the said judge or judges, it hath truly cost him in defence of the suit." Which statute has been since extended, by the 14 Geo. 2. c. 10. to "every citizen and freeman of the city of *London*, and every other person and persons inhabiting within the said city or its liberties, and also to persons renting or keeping any shop, shed, stall, or stand, or seeking a livelihood there, who have debts owing them, not exceeding the sum of forty shillings, by any person or persons inhabiting or seeking a livelihood

hood within the said city or its liberties, during their respective inhabitancy or seeking a livelihood as aforesaid."

And towards the latter end of the last reign, several acts of parliament were made, establishing courts of conscience in various districts, in and about the metropolis; as in the town and borough of *Southwark*, &c. by the 22 Geo. 2. c. 47.; in the city and liberty of *Westminster*, and part of the dutchy of *Lancaster*, by the 23 Geo. 2. c. 27. (explained and amended by the 24 Geo. 2. c. 42.); and in the *Tower-hamlets*, by the 23 Geo. 2. c. 30. And by the 23 Geo. 2. c. 33. the county court of *Middlesex* was put on a different footing, for the more easy and speedy recovery of small debts.

In these acts of parliament there are exceptions, respecting the *causes* and *persons*, of which and over whom the courts are to have jurisdiction. Thus, in the 7 Jac. 1. c. 15. there is an exception or proviso^m, that "it shall not extend to any

^m § 6.

debt for *rent* upon any lease of lands or tenements, or any other real contracts, nor to any other debt that shall arise by reason of any cause concerning a testament or matrimony, or any thing concerning or properly belonging to the ecclesiastical court, although the same be under forty shillings." And there is a similar exception in the court of conscience act for the *Tower-hamlets*^a; which exception has been construed to apply to an action for use and occupation^o. And it is a constant and invariable rule, that none of the court of conscience acts extend to cases, where the sum recovered is reduced under forty shillings, by means of a set-off^p, or tender^q. Respecting *persons*, the court in one instance permitted a suggestion to be entered on the roll, in an action brought by an *administrator*^r. But in an action brought against an *executor*, they refused it^s; saying, it could not be meant to give the court of conscience a jurisdiction

^a Doug. 67. 245.

^o Id. 244.

^p 2 Str. 1191. 1 Will. 19. S. C. 2 Will. 68.

^q Will. 48.

^r Doug. 67. 448, 9.

^s Id. 246.

^t Id. 263.

over executors ; and that if there was no express exception, there was one implied from the nature and reason of the thing. An *attorney* is not subject to the jurisdiction of the county court of *Middlesex*^t ; but in *Westminster*^u, and the *Tower-hamlets*^v, he is expressly subjected thereto. And in *Middlesex*, if he be sued in a superior court, for a debt under forty shillings, he may, according to a late determination^w, move the court to stay the proceedings.

By the *Westminster* court of conscience act, the mode prescribed for a defendant to obtain his costs is by *plea* ; and if that mode be not adopted, the court will not, after verdict, enter a *suggestion* on the record, that the defendant lived within the jurisdiction, or stay the proceedings^x. But in general, where the act is not pleaded, the proper mode is, for the defendant to apply to the court,

^t 2 Will. 42. Doug. *est.* 380. 3 Bur. 1533. *Semb. contra.*

^u Doug. *est.* 380.

^v Stat. 19 G. 3. c. 68. s. 24.

^w 4 T. R. 495.

^x 3 T. R. 452.

by affidavit, for leave to enter a suggestion on the roll, of the facts necessary to entitle him to the benefit of the act^y: which suggestion may be traversed or demurred to. And where the plaintiff demurred to the suggestion, which was adjudged against him, the costs of the application were allowed, as well as of the trial and former proceedings^z; though not, strictly speaking, costs of the defence. But where the inquest is taken by default, there can be no suggestion on the roll^a; for the defendant is out of court, as to all purposes, but that of having judgment against him.

By the 21 Jac. 1. c. 16. it is enacted, that “ in all actions upon the case for slanderous words, to be sued or prosecuted in any of the courts of record at Westminster, or in any court whatsoever that hath power to hold plea of the same, if the jury upon the trial of the issue in such action, or the jury that

Of costs in actions for words.

^y 1 Str. 47. 50. 2 Str. 1120. Barnes, 353. Say. Rep. 273. 2 Will. 68.

^z 2 Str. 1120.

^a 1 Str. 46.

shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same; any law, statute, or usage to the contrary notwithstanding." The operation of this statute is confined to actions for slanderous words spoken of the *person*, and does not extend to actions for slander of *title*^b, &c. wherein the special damage is the gist of the action; neither, for the same reason, does it extend to an action for special damage, in consequence of words not in themselves actionable^c; though, where the words are actionable in themselves, a special damage will not take the case out of the statute^d. This statute applies to a writ of *inquiry*, as well as a *trial*, where the damages are under forty shillings^e; and

^a Cro. Car. 141. 163. 1 Str. 645.

^b 2 Ld. Raym. 831. 1 Salk. 206. 7 Mod. 129. S. C. Barnes, 135.

^c 2 Ld. Raym. 1588. 2 Str. 936. S. C. Barnes, 132. 142. 3 Bur. 1688. 2 Blac. Rep. 1062. Cas. Tr. C. B. 137. *contra*. ^e 2 Str. 934.

7 a *just*

a *justification* found for the plaintiff will not, in that event, entitle him to full costs^f.

But the *principal* statute, made for restraining the plaintiff's right to costs, is the 22 & 23 Car. 2. c. 9. (extended to *Wales*, and the counties *palatine*, by the 11 & 12 W. 3. c. 9.); by which it is enacted, that "in all actions of trespass, assault and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question; the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit, than the damages so found shall amount unto." It seems to have been the intention of this statute,

Of the costs
in *trespass*.

^f Barnes, 128.

that the plaintiff shall have no more costs than damages, in any personal action whatsoever, if the damages be under forty shillings, except in cases of battery or freehold; and not even in these, without a certificate. And this construction was adopted, in some of the first cases that arose upon the statute^g. But a different construction soon prevailed; and it is now settled, that the statute is confined to actions of assault and battery; and actions for *local* trespasses, wherein it is possible for the judge to certify, that the freehold or title of the land was chiefly in question^h. Therefore it does not extend to actions of debt, covenant, *assumpsit*, troverⁱ, or the like; or to actions for a mere assault^k; or for criminal conversation^l, or battery of the plaintiff's servant^m, *per quod consortium vel servitium amisit*.

^g 3 Keb. 121. 247.

^h T. Raym. 487. T. Jon. 232. 2 Show. 258. S. C. 3 Mod. 39. 1 Salk. 208. 1 Str. 577. Gilb. Eq. Rep. 195. Barnes, 134. 3 Willf. 322. S. C. H. Black. 294. ⁱ 3 Keb. 31. 1 Salk. 208.

^k 3 T. R. 391. ^l 3 Willf. 319.

^m 3 Keb. 184. 1 Salk. 208. 1 Str. 192.

In actions for *local* trespasses, the statute applies, wherever an injury is done to the *freehold*ⁿ, or to any thing *growing*^o upon, or *affixed*^p to, the freehold: and in a modern case^q it was carried still further. That was an action of trespass *quare clausum fregit*: the first count stated, that the defendants broke and entered the close of the plaintiffs, and the grass of the plaintiffs there then growing, with their feet in walking, trod down, spoiled, and consumed; and dug up and got divers large quantities of turf, peat, fods, heath, stones, soil and earth of the plaintiffs, in and upon the place in which, &c.; and took and carried away the same, and converted and disposed of the same to their own use. There was

ⁿ 2 Vent. 48. Com. Rep. 19. 1 Salk. 208. 1 Str. 577. 633. 645. Gilb. Eq. Rep. 195. 2 Str. 726. 2 Ld. Raym. 1444. S. C.

^o *Hill v. Reeves*, B. N. P. 330. Barnes, 144.

^p *Birch v. Daffey*, B. N. P. 330. 1 Str. 633. Cas. Pr. C. B. 86. Barnes, 121.

^q Doug. 687. 779. And see 1 Str. 633. 645. Gilb. Eq. Rep. 197, 8. S. C. 3 Bur. 1232. *accord.* But see 2 Vent. 215. Skin. 66. Com. Rep. 19. 1 Salk. 208. 1 Str. 192. *semb. contra.*

another count, upon a similar trespass, in another close. The defendants pleaded the general issue to the *whole* declaration, and two special pleas to the *second* count. And, on the trial, a verdict was found for the plaintiffs on the general issue, with one shilling damages; and for the defendants on the special pleas, and the judge had not certified. *Per lord Mansfield*: "The question on this record is, whether the plaintiffs are entitled to any more costs than damages, under the statute 22 & 23 Car. 2. c. 9.? There is a puzzle and perplexity in the cases on this part of the statute, and a jumble in the reports; and as the question is a general one, we thought it proper to consult all the judges; and they are all of opinion, that this case is within the statute, and that the plaintiffs ought to have no more costs than damages. You will observe, that what has been called an *asportavit* in this declaration, is a mode or qualification of the injury done to the land. The trespass is laid to have been committed on the land by digging, &c. and the *asportavit* as part of the same act; and,

and, on the trial of the issue, the freehold certainly *might* have come in question. This is clearly distinguishable from an *asportavit* of personal property, where the freehold cannot come in question, and which therefore is not within the act. Thus, after trees are cut down, and thereby severed from the freehold, if a trespasser comes and carries them away, that case is not within the statute; because the freehold cannot come in question: here it might.”

Where an injury is done to a *personal* chattel, it is not within the statute^r; nor where an injury to a personal chattel is laid, in the same declaration, with an assault and battery, or local trespass^s. And consequently, in these cases, though the damages be under forty shillings, the plaintiff is entitled to full costs, without a certificate. But then it must

^r 3 Keb. 389. 469. T. Jon. 232. 1 Salk. 208.
1 Str. 534. Gilb. Eq. Rep. 197. S. C.

^s 3 Mod. 39. 1 Salk. 208. 1 Str. 192. 551. Gilb. Eq. Rep. 197. S. C. Barnes, 119, 120. 134. 3 Will. 322. S. C. 2 Str. 1130. Say. Costs, 39.

be a substantive and independent injury : for where it is laid, or proved, merely in aggravation of damages, as a mode or qualification of the assault and battery, or local trespass^t, or there is a verdict for the defendant, upon that part of the declaration which charges him with an injury to a personal chattel^u, it is within the statute. So where a *laceravit*, or tearing of the plaintiff's cloaths, is laid in the declaration^v, or found by the jury^w, to be merely in *consequence* of an assault and battery, the plaintiff, recovering less than forty shillings damages, is not entitled to full costs, without a certificate.

The certificate required by this statute need not, it seems, be granted at the trial of the cause*. And where the defendant lets judgment go by default^x, or *justifies* the assault and battery, or pleads in such a manner, as to bring the freehold or

^t 1 Str. 624. *Ante*, 22.

^u 2 Vent. 180. 195. Cal. Pr. C. B. 118. ^v Say. Rep. 91.

^w 1 T. R. 655. and see H. Black. 291.

* 11 Mod. 198.

^x B. N. P. 329.

title of the land in question, on the face of the record, or a *view* is granted¹, a certificate is holden to be unnecessary; as also, where, to a plea of a right of way, there is a replication of *extra viam*². But where, in an action for an assault and battery, the defendant justifies the assault only³, or an assault only is certified by the judge^b, the plaintiff, recovering less than forty shillings, is not entitled to more costs than damages; though, in the latter case, to entitle him to full costs, the judge may certify, on the 8 & 9 W. 3. c. 11. that the assault was wilful and malicious^c. The award of an arbitrator is not tantamount to a judge's certificate, under the 22 & 23 Car. 2. c. 9.^d

Where the plea or issue, though special, is *collateral* to the question of freehold or title to the land, as where the

¹ 1 Ld. Raym. 76. 2 Salk. 665. S. C.

² 2 Lev. 234. 2 Ld. Raym. 1444. 2 Str. 726. S. C. *Id.* 1168. Say. Rep. 251.

^a 3 T. R. 391.

^b 2 Lev. 102.

^c 3 Will. 326.

^d 3 T. R. 138.

defendant

defendant justifies an entry as bailiff under process, and issue is joined upon the door's being shut^e, or where, upon a plea of a distress for rent, there is an issue on the defendant's being bailiff^f, a certificate is necessary, to entitle the plaintiff to full costs: and it is also necessary, where the plaintiff recovers less than forty shillings damages, on a plea of not guilty to a new assignment^g. But where the plaintiff is entitled to costs upon the new assignment, he is entitled to the costs of all the previous pleadings^h.

None of the statutes, made for restraining the plaintiff's right to costs, extend to actions brought in an *inferior* court, and removed by the defendant into a *superior* oneⁱ: and it has been holden, that the 21 Jac. 1. c. 16.^k and the 22 & 23 Car. 2. c. 9.^l only restrain the *court* from

^e 2 Barnard. K. B. 277. ^f Say. Rep. 250.

^g Barnes, 124. 129. S. C. *Id.* 149. B. N. P. 330.

^h 1 T. R. 636.

ⁱ 2 Lev. 124. 4 Mod. 378, 9. 1 Ld. Raym. 395.
Caf. Pr. C. B. 45. (a).

^k 1 Salk. 207.

^l Caf. Pr. C. B. 45.

award-

awarding more costs than damages ; but the *jury*, not being restrained thereby, may give what costs they please.

The restraint put upon the plaintiff's general right to costs, by the 22 & 23 Car. 2. c. 9. has been since *partly* taken off, by subsequent statutes. Thus, by the statute 4. & 5 W. & M. c. 23. § 10. after reciting, that great mischiefs ensue by inferior tradesmen, apprentices, and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves and damage of their neighbours, it is enacted, that “ if any such person shall presume to hunt, hawk, fish, or fowl (unless in company with the master of such apprentice, duly qualified by law), such person shall be subject to the penalties of this act, and shall or may be sued or prosecuted for his wilful trespass, in such his coming on any person's land; and if found guilty thereof, the plaintiff shall not only recover his damages thereby sustained, but his *full* costs of suit; any former law to the contrary

Of costs, on the 4 & 5 W. & M. c. 23.

trary notwithstanding." It has been holden, that a *clothier* is an inferior tradesman, within the meaning of this statute^m; and it is said, that the words "*inferior tradesmen*" extend to every tradesman who is not qualified to kill gameⁿ: but this was doubted in a subsequent caseⁿ, wherein the judges were divided in opinion, upon the question, whether a *surgeon* and *apothecary* should be considered as an inferior tradesman.

Of costs, on
the 8 & 9
W. 3. c. 11.

So, by the 8 & 9 W. 3. c. 11. § 4. for the preventing of wilful and malicious trespasses, it is enacted, that "in all actions of trespass, to be commenced or prosecuted in any of his majesty's courts of record at Westminster, wherein at the trial of the cause it shall appear, and be certified by the judge under his hand, upon the back of the record, that the trespass, upon which any defendant shall be found guilty, was *wilful* and *malicious*, the plaintiff shall recover not only his damages, but his *full* costs of suit;

^m Barnes, 125.

ⁿ 2 Will. 70. Say. Costs, 54. S. C.

any former law to the contrary notwithstanding." The certificate, required by this statute, need not be granted at the trial of the cause^o; and it is said, that the statute extends to every trespass, that is not accidental as well as trifling^p.

I shall next proceed to consider in what cases the plaintiff is entitled to costs, where there are several *counts* or *pleas*, the issues upon which are some of them found for the plaintiff, and some for the defendant.

In the *common pleas*, where the declaration consists of several counts, and the plaintiff succeeds upon any one of them, he is entitled to the costs of the *whole* declaration^a; though the defendant succeed upon the other counts. But it is otherwise in the *king's bench*; for there, neither party is allowed costs, as to those counts, the issues upon which are found

Of the costs
on several
counts.

^o *Swinerton v. Jarvis*, E. 22 G. 3. C. P. 1 T. R. 636. K. B. but see 2 Will. 21. Doug. *est.* 103. n. *contra*. P 6 Mod. 153.

^a B. N. P. 335. 2 Blac. Rep. 800. 1199.

for

for the defendant'. In the latter court, where the plaintiff's declaration consisted of two counts, to one of which the defendant pleaded the general issue, which was found for the plaintiff, and to the other a justification, to which the plaintiff demurred, and judgment was thereupon given for the defendant; the court agreed, that the defendant could have no costs upon the demurrer^s. But if there be two distinct causes of action, in two separate counts, and as to one the defendant suffers judgment to go by default, and as to the other takes issue, and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment and costs on the first count^t.

Of the costs
of double
pleading.

By the statute for the amendment of the law, (4 Ann. c. 16. § 4, 5.) it is enacted, that "it shall and may be lawful for any defendant or tenant in any

^r Say. Costs, 212. Doug. *est.* 677. but see 1 Wilf. 331.

^s Say. Costs, 211. 2 Bur. 1232. S. C. *Tamen quare*, and see the stat. 8 & 9 W. 3. c. 11. § 2.

^t 3 T. R. 654.

action or suit, or for any plaintiff in *replevin*, in any court of record, with the leave of the same court, to plead as many several matters thereto, as he shall think necessary for his defence."

" Provided nevertheless, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found, upon any issue in the said cause, for the plaintiff or demandant, costs shall be also given in like manner, unless the judge, who tried the said issue, shall certify, that the said defendant or tenant, or plaintiff in *replevin*, had a probable cause to plead such matter, which upon the said issue shall be found against him."

" The certificate upon this statute is not required to be made in court, at the trial of the cause " ; and, where the judge refuses to grant it, the court have not a discretionary power, whether they will

" Barnes, 141.

allow the defendant *any* costs at all; but are bound by the statute to allow him *some* costs, though the *quantum* is left to their discretion^v. The intention of the legislature was, that if there be several matters pleaded, some of which are found for the plaintiff, he shall be entitled to the costs of those^w, notwithstanding other matters are found for the defendant, which entitle him to judgment upon the whole record; unless the judge, before whom the cause was tried, shall certify, that the defendant had a probable cause to plead the matters which are found against him. That this is the true construction of the statute, will appear from the following cases.

In *trespass*, the defendant pleaded not guilty and several justifications; upon

^v Barnes, 140. 2 T. R. 394, 5.

^w In *Sayer's Law of Costs*, p. 223. it is said, he shall have the costs not only of *those* matters, but also of the *others*, notwithstanding they are found for the defendant. But this seems to be a mistake; for the defendant, being entitled to judgment upon the matters found for him, is consequently entitled to the costs of them.

the trial, the plaintiff not proving his possession of the *locus in quo*, the defendant had a verdict; and, by direction of *Denison, J.* the verdict was entered upon the general issue only; upon which there was a motion for a *venire de novo*: but the court refused the motion, saying, the verdict was complete, and determined the cause; that the plaintiff was not entitled to damages, though, they said, he might have insisted to have a verdict entered on the other issues, for the sake of *costs*, which he would be entitled to, unless the judge certified, that the defendant had probable cause to plead such plea^x. But where the defendant, in *trespass*, pleaded *three* different justifications, to three different counts, and, on issue joined, had a verdict for him on *two*, and against him on the *third*; on motion, this was holden not to be a case within the act, and that the plaintiff was entitled to costs at common law, on the *whole* declaration^y.

^x B. N. P. 335.

^y *Id. ibid.* but note, this was in the common pleas.

Where the defendant pleads not guilty, and a justification to which the plaintiff demurs, and the plaintiff has judgment on the demurrer, but is nonsuited on the plea of not guilty, he shall nevertheless be allowed the costs of the demurrer, which shall be deducted out of the costs allowed to the defendant². And if one of several pleas, pleaded by defendant, be adjudged bad, on a demurrer to plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted, from the costs taxed for the defendant upon the *poslea*, if afterwards, upon the trial of the issues joined on the other pleas, the defendant should have a verdict; even though it should appear, on the whole of the record, that the plaintiff had no cause of action³. But if the plaintiff take issue on several pleas, one of which is *insufficient* in law, and has a verdict on all the issues, except that joined on the insufficient plea, which is found for the defendant, and afterwards judgment is en-

² Barnes, 136.

³ 2 T. R. 391.

tered for the plaintiff, still he shall not be allowed any costs, upon the issue found for the defendant^b. And it has been resolved, at a meeting of all the judges, that if there be a certificate upon the 43 Eliz. the plaintiff shall not have the costs of any plea, pleaded with leave of the court; although the issue thereupon joined be found for him, and the judge have not certified, that the defendant had a probable cause for pleading the matter therein pleaded^c.

In *crim. con.* the defendant pleaded two pleas, *viz.* not guilty, and not guilty within *six* years; on the former, the plaintiff joined issue, and obtained a verdict, but to the latter there was a demurrer, and judgment against him; and it was holden, that the defendant should have the costs of the demurrer, but, upon the trial, there should be no costs on either side^d.

The

^b 1 T. R. 266. but see Barnes, 133.

^c Say. Rep. 260.

^d 2 Bur. 753. 2 Will. 85. S. C. The authority of this case seems to be questionable, as to the costs of the

The *avowant* or defendant in replevin, though not within the words, is plainly within the meaning, of the statute 4 Ann. c. 16. And accordingly, where some issues in replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant, the latter must be allowed the costs of the issues found for him, out of the general costs of the verdict; unless the judge certify, that the plaintiff had a probable cause for pleading the matters, on which those issues are joined^f: and the general rule is said to be this, where several matters are pleaded by the plaintiff, some of which are found for him, and others for the defendant, so that the plaintiff is entitled to judgment; if the judge who tried the cause certify, that there was a probable cause for pleading those pleas, the master is

trial, from a similar one that was differently determined, in the court of common pleas, (Barnes, 141.) as well as from the reasoning that prevailed in several of the foregoing cases.

^f 2 T. R. 235.

not to deduct the costs of the issues so found for the defendant, but if there be no certificate, the defendant is entitled to have those costs deducted for him ^e.

It has already been observed ^h, that no costs were recoverable by a *defendant* at common law: and the reason seems to be, that if the plaintiff failed in his suit, he was amerced to the king *pro falso clamore*, which was thought to be a sufficient punishment, without subjecting him to the payment of costs. The first instance of costs being given to a defendant, was in a writ of right of *ward*, by the statute of *Marlberge*, (52 Hen. 3.) c. 6. Afterwards, costs were given to the defendant in *error*, by the 3 Hen. 7. c. 10. and in *replevin*, by the 7 Hen. 8. c. 4. and 21 Hen. 8. c. 19, &c. But in one of these cases, the defendant is to be considered as an actor; and in the

Of the defendant's right to costs.

^e 2 T. R. 237. and see Barnes, 141. 144. 146. Doug. *est.* 703, 9. *in notis, accord.* ^h *Ante*, 2.

other of them, the provision is virtually for the benefit of the plaintiff in the original action¹.

Of the costs
in error.

In *Error*, brought by the defendant *before*^k execution, or by the plaintiff upon a judgment for the defendant, if the judgment be affirmed, the writ of error discontinued, or the plaintiff in error nonsuited, the defendant in error is entitled to costs, by the 3 Hen. 7. c. 10. and 8 & 9 W. 3. c. 11. § 2.; upon the former of which statutes it has been holden, that costs are recoverable in error, for the delay of execution, although none were recoverable in the original action¹. By the 13 Car. 2. stat. 2. c. 2. § 10. if the judgment be affirmed after verdict, the plaintiff shall pay to the defendant in error, his *double* costs. And by the 4 Ann. c. 16. § 25. for preventing vexation, from suing out

¹ Say. Costs, 70.

^k Cro. Jac. 636.

¹ Dyer, 77. Cro. Eliz. 617. 659. 5 Co. 101. S. C. Cro. Car. 145. 1 Str. 262. 2 Str. 1084. but see Cro. Car. 425. 1 Lev. 146. 1 Vent. 38. 166. 4 Mod. 245. Carth. 261. S. C. *semb. contra*.

defective writs of error, it is enacted, that
 “ upon the quashing of any writ of error,
 for variance from the original record, or
 other defect, the defendant shall recover
 against the plaintiff in error his costs,
 as he should have had, if the judgment
 had been affirmed, and to be recovered in
 the same manner ^m :” which costs include
 those of the motion, for quashing the
 writ of error ⁿ. And though no costs
 were recoverable in the original action,
 they are payable, on quashing a writ of
 error ^o. Put where the defendant in
 error enters continuances, to defeat the
 writ of error, the plaintiff in error is not
 liable to costs, on quashing it ^p. And
 none of the statutes before mentioned give
 costs, upon the *reversal* of a judgment ^q.

In *Replevin*, or second deliverance, the
 defendant, making avowry, cognizance,
 or justification, for rents, customs, or ser-

Of the costs
 in *replevin*,
 &c.

^m 2 Str. 834. Cal. Temp. Hardw. 137.

ⁿ 2 Ld. Raym. 1403. 1 Str. 606. 8 Mod. 316.

S. C. ^o 1 Str. 262.

^p 1 Str. 139. 2 Str. 834. Barnes, 250.

^q 1 Str. 617.

vices, or for damage feasant, is entitled to costs, by the 7 Hen. 8. c. 4. and 21 Hen. 8. c. 19. § 3. if the avowry, cognizance, or justification be found for him, or the plaintiff be nonsuit, or otherwise barred: which statutes extend to avowries, &c. made by an *executor*^r, or for an *estray*^s, and, as it should seem, for an *amercement* by a court leet^r; but not to pleas of *prisel en auter lieu*, upon which the writ is abated^u, or to pleas of *property* in the thing distrained^v. By the 17 Car. 2. c. 7. § 2. the defendant obtaining judgment thereon, for the arrearages of rent, or value of the goods distrained, is also entitled to his *full* costs of suit. And by the 11 Geo. 2. c. 19. § 22. if the defendant avow, or make cognizance, according to that statute, upon a *disseise* for rent, relief, heriot, or other service, and the plaintiff be nonsuit, discontinue his action, or have judgment against him, the defendant shall recover *double* costs of suit. But this latter

^r 2 Rol. Rep. 437.

^s Cro. Eliz. 330.

^t Cro. Jac. 520. but see Cro. Eliz. 300. *semb. contra.*

^u Com. Rep. 122.

^v Hardr. 153.

statute does not extend to a *seizure* for a heriot *custom*^w.

At length, by the statute 23 Hen. 8. c. 15. § 1. it was enacted, that “ in trespass upon the statute 5 Rich. 2. debt, covenant, detinue, account, trespass on the case, or upon any statute for an offence or wrong personal, immediately supposed to be done to the plaintiff, if the plaintiff, after the appearance of the defendant, be nonsuited, or a verdict pass against him, the defendant shall have judgment to recover his costs against the plaintiff, to be assessed and taxed by the discretion of the judge or judges of the court, where such action shall be commenced or sued; and shall have such process and execution, for the recovery of the same, against the plaintiff, as the plaintiff should or might have had against the defendant, in case judgment had been given for the plaintiff.”

Of costs, on the 23 H. 8. c. 15.

But by § 2. of the same statute, it is provided, that “ every *poor* person, being

^w Barnes, 148.

plaintiff

plaintiff in any such action, who at the commencement of his suit shall be admitted, by the discretion of the judge or judges where the action is pursued, to have his process and counsel of charity, without paying money or fee for the same, shall not be compelled to pay any costs, by virtue of this statute; but shall suffer other punishment, as by the discretion of the justices, before whom the suit shall depend, shall be thought reasonable."

Of paupers. A *pauper* or *poor* person, in the eye of the law, is one who will swear that he is not worth ten pounds, after all his debts are paid, except his wearing apparel, and the subject matter of the action^x; and such a one may, upon petition, and affidavit of his extreme poverty, supported by a certificate of his cause of action, be admitted to sue *in formâ pauperis*: which admission may be either at the commencement of the suit, or afterwards *pendente lite*^y. And upon his being so

^x 2 Lil. P. R. 633.

^y Say. Costs, 90. 3 Will. 24.

admitted, an attorney and counsel shall be assigned him, pursuant to the statute 11 Hen. 7. c. 12. ; and he shall be permitted to carry on the proceedings *gratis*, without using stamps^a, or paying fees to the officers of the court, unless he obtain a verdict for more than ten pounds, and then the officers shall be paid their court fees, and for passing the record, &c. Neither, as we have just seen, is a pauper liable to pay costs to the defendant, if he be nonsuited, or have a verdict against him ; but shall suffer other punishment at the discretion of the justices. It has been said, that if a pauper be nonsuited, he shall pay costs or be whipped^a; but this punishment does not appear to have been ever inflicted^b. If the pauper do not proceed to trial according to notice, or otherwise misbehave himself, the court will order him to be dispaupered^c; but until this be done, they will not

^a Stat. 5 W. & M. c. 21. § 14, &c.

^a 1 Sid. 261. 2 Salk. 506. 7 Mod. 114.

^b *Id. ibid.*

^c 2 Lil. P. R. 633. 2 Salk. 506. 2 Str. 1122.

make any rule about costs ^d. And, unless the pauper's conduct appear to have been vexatious, the court will not stay the proceedings in a second action, until the costs are paid, of a nonsuit in a prior one, for the same cause ^e: nor, if the pauper should succeed in the second action, will they deduct the costs of the first, out of those recovered in the second ^f.

Of executors
and admin-
istrators.

Executors and administrators are not particularly excepted out of the statute 23 Hen. 8. c. 16. yet, as that statute only relates to contracts made with, or wrongs done to the plaintiff ^g, it has been uniformly holden ^h, that they are not liable to costs, upon a nonsuit or verdict, where they necessarily sue in their representative character, and cannot bring the action in their own right; as upon a

^d 2 Str. 878. 3 Willf. 24. but see Caf. Pr. C. B. 47.
ⁱ Str. 420. *semb. contra.*

^e 2 Str. 878. 1121. 3 Willf. 24. but see 2 T. R. 511.

^f 2 Str. 891.

^g 2 Str. 1107.

^h Cro. Eliz. 503. Cro. Jac. 229. 2 Bulst. 261.
ⁱ Salk. 207. 314. 3 Bur. 1586. Say. Costs, 97.

contract

contract entered into with the testator or intestateⁱ, or for a *wrong* done in his lifetime^k. But where the cause of action arises after the death of the testator or intestate, and the plaintiff may sue thereon in his own right, he shall not be excused from the payment of costs, though he bring the action as executor or administrator; as upon a *contract*^l, express or implied, or in *trover*^m for a conversion, after the death of the testator or intestate. An executor or administrator is liable to costs, upon a judgment of *non pros*ⁿ: and where he has *knowingly* brought a wrong action, or otherwise been guilty of a *wilful* default, he shall pay costs upon a discontinuance^o, or for not pro-

ⁱ T. Jon. 47. 2 Ld. Raym. 1414. 1 Str. 682. S. C. Caf. Pr. C. B. 157. Pr. Reg. 118. S. C. Barnes, 141.

^k Barnes, 129.

^l 6 Mod. 91. 181. 1 Salk. 207. S. C. 1 Ld. Raym. 436. 1 Str. 682. Barnes, 119. 2 Str. 1106. 4 T. R. 277.

^m Com. Rep. 162. Caf. Pr. C. B. 61. Barnes, 132. Caf. Temp. Hardw. 204. But see 3 Lev. 60. *semb. contra.*

ⁿ Caf. Pr. C. B. 14. 157, 8. 3 Bur. 1585.

^o Caf. Pr. C. B. 79. 3 Bur. 1451. 1 Blac. Rep. 451. S. C.

ceeding

ceeding to trial according to notice^p; but otherwise he is not liable to costs, in either of these cases^q. Nor, where he merely sues *en autre droit*, is he liable to costs, upon a judgment as in case of a nonsuit^r.

Of costs, on
the 8 Eliz.
c. 2.

The statute 23 Hen. 8. c. 15. only relates to cases where the plaintiff is nonsuited, or has a verdict against him. But by the statute 8 Eliz. c. 2. "upon process issuing out of the court of king's bench, if the plaintiff do not declare in three days after bail put in, or if after declaration he do not prosecute his suit with effect, but willingly suffer the same to be delayed or discontinued, or he be nonsuited therein, the judges, by their discretions, shall award to the defendant his costs, damages, and charges in that behalf sustained." This statute does not extend, any more than the former, to actions brought by executors and admi-

^p Cas. Pr. C. B. 158. 3 Bur. 1585.

^q 2 Str. 871. Barnes, 133. 4 Bur. 1927.

^r 4 Bur. 1928.

nistrators,

nistrators^s, in their representative character. But if the plaintiff enter a *nolle prosequi*, the defendant is entitled to costs upon this statute¹.

The plaintiff, we may remember, is not entitled to costs in a *popular* action, for the whole or part of a penalty, given by statute to a common informer, unless they are expressly given him by the statute². Nor was the defendant entitled to costs, in such an action, until the statute 18 Eliz. c. 5. § 3. (made perpetual by the 27 Eliz. c. 10.) by which it is enacted, that "if any common informer shall willingly delay his suit, or shall discontinue or be nonsuit, or shall have the matter pass against him therein by verdict or judgment in law, the said informer shall pay to the defendant his costs, charges, and damages, to be assigned by the court in which the suit shall be attempted:" with a proviso, that "this act shall not extend to any officer

Of the defendant's costs in a *popular* action.

¹ Cro. Eliz. 69. Cro. Jac. 361.

² 3 T. R. 511.

³ *Antz.*

who,

who, in respect of his office, has heretofore usually sued upon penal laws; nor to any officer suing only for matters concerning his office ^v." This law extends to actions brought upon a *subsequent* statute ^w, or one that is *repealed* ^x; and also to actions *qui tam*, for *part* of a penalty, as well as where the *whole* is given to a common informer ^y: but it does not extend to actions, brought by the party grieved, upon a *remedial* statute ^z.

Of costs, on
the 4 Jac. 1.
c. 3.

There being still many cases, in which the defendant was not aided by the provisions of the before-mentioned statutes ^a, it was enacted by the statute 4 Jac. 1. c. 3. that "if any person shall commence in any court, any action of trespass, *ejectione firmæ*, or any *other* action whatsoever, wherein the plaintiff or demandant might have costs, in case judgment should be

^v 2 Ld. Raym. 1333. B. N. P. 334.

^w 1 Will. 177.

^x Hutt. 35, 6. 2 Keb. 106. ^y Cowp. 366.

^z 1 And. 116. 2 Leon. 116. 4 Leon. 55. Cro. El. 177. Hutt. 22. 1 Saik. 30.

^a 2 Leon. 9. 3 Leon. 92. B. N. P. 334.

given

given for him, and the plaintiff shall be nonsuited therein, after the appearance of the defendant, or a verdict shall pass against him by lawful trial, that then the defendant, in every such action, shall have judgment to recover his costs against the plaintiff or demandant, to be assessed and levied in like manner as upon the 23 Hen. 8. c. 15." By this statute the defendant is entitled to costs, on a nonsuit or verdict, in all cases where the plaintiff would have been entitled to them, if he had obtained judgment. And though the declaration be insufficient, so that the plaintiff could not have had costs thereon, the defendant is nevertheless entitled to costs, for the unjust vexation^b.

By the 13 Car. 2. stat. 2. c. 2. § 3. it is enacted, that "upon an appearance entered for the defendant, by attorney, of the term wherein the process is returnable, unless the plaintiff shall put

Of the costs
on a *nonsuit*.

^b Meor, 625. 1 Bulst. 129. 3 Bulst. 248. Hob. 219. Hutt. 16. S. C. Cro. Car. 175. But see Cro. Jac. 158, 9. *semb. contra*.

into the court, from whence the process issued, his bill or declaration against the defendant, in some personal action, or ejectment of farm, before the end of the term next following after appearance, a nonsuit for want of a declaration may be entered against him ; and the defendant shall have judgment, to recover costs against the plaintiff, to be taxed and levied in like manner as upon the 23 Hen. 8. c. 15."

Of costs for
the defend-
ant on *de-*
murrer.

And still further to discourage the bringing of frivolous and vexatious actions, it is enacted by the statute 8 & 9 W. 3. c. 11. § 2. that " if any person shall commence or prosecute any action, in any court of record, wherein upon *demurrer*, either by plaintiff or defendant, demandant or tenant, judgment shall be given by the court against the plaintiff or demandant, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by *capias ad satisfaciendum*, *feri facias*, or *elegit*." This statute does not extend to demurrers

zers to pleas in abatement^c; nor in any action, wherein the defendant would not have been entitled to costs, upon a non-suit or verdict^d.

Where there are several defendants, who succeed in the action, the plaintiff may pay costs to which of them he pleases^e: and if they fail, each of them is answerable for the whole costs. Thus, where an ejectment was brought against several defendants, who defended severally, and at the assizes one of them confessed lease entry and ouster, and had a verdict against him, but the others did not confess; the court upon application said, the officer must tax the same costs against all the defendants; and that if the plaintiff, after he had satisfaction against one, should take out execution against another, the latter might apply to the court^f.

Of costs, where there are several defendants.

^c 1 Ld. Raym. 337. 1 Salk. 194. 12 Mod. 195. Comb. 432. S. C. 2 Ld. Raym. 992. 1 Salk. 194. 6 Mod. 83. S. C.

^d Caf. Pr. C. B. 25. *Id.* 4. *contra.*

^e 1 Str. 516. 2 Str. 1203. ^f B. N. P. 335, 6.

Where one of several defendants lets judgment go by default, and the other pleads a plea which goes to the whole, and shews that the plaintiff had no cause of action, if this plea be found for the defendant who pleaded it, he shall have costs; and being an absolute bar, the other defendant shall have the benefit of it, and shall not pay costs to the plaintiff^h. But where the plea does not go to the whole, but is merely in *discharge* of the party pleading it, there the other party shall not have the benefit of it; but shall pay costs, though it be found against the plaintiffⁱ.

Before the statute 8 & 9 W. 3. c. 11. if one of several defendants was *acquitted*, he was not entitled to his costs; the courts construing the former acts to relate only to the case of a total acquittal, of all the defendants^k. This being found

^h Co. Lit. 125. Cro. Jac. 134. 1 Lev. 63. 1 Sid. 76. 1 Keb. 284. S. C. 2 Ld. Raym. 1372. 1 Str. 610. 8 Mod. 217. S. C. Cal. Pr. C. B. 107. Pr. Reg. 102. S. C.

ⁱ *Id. ibid.* 1 Wils. 89. 3 T. R. 656.

^k 2 Str. 1005. and see 1 Salk. 194.

inconvenient, it was enacted, by the same statute, § 1. that “where several persons shall be made defendants, to any action of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be, upon the trial thereof, acquitted by verdict, every person so acquitted shall recover his costs of suit, in like manner as if the verdict had been given against the plaintiff, and acquitted all the defendants; unless the judge, before whom the cause is tried, shall immediately after the trial thereof, in open court, certify upon the record under his hand, that there was a reasonable cause for making such person a defendant.” This statute is confined to the particular actions therein mentioned; and does not extend to an action of trespass upon the *case*¹, nor consequently to an action of *trover*^m: neither does it extend to an action of *replevin*ⁿ.

When a *feigned* issue is ordered by a court of *law*, whether it be in a civil or

Of the costs of a *feigned* issue.

¹ 2 Str. 1005.

^m Barnes, 139.

ⁿ 3 Bur, 1284. 1 Elac. Rep. 355. S. C.

criminal proceeding, the costs always follow the verdict, and must be paid to the party obtaining it°. But when a feigned issue is ordered by a court of *equity*, the costs do not follow the verdict, as a matter of course; but the finding of the jury is returned back, to the court which ordered it, and the costs there are in the discretion of the court°. Where the issue is ordered by a court of law, on a rule for an information^p, or motion for an attachment^q, the costs of the original rule, or motion, do not in general follow the verdict, but only the costs of the feigned issue; which costs are to be reckoned, from the time when the feigned issue was first ordered and agreed to^r. Yet, where it was ordered, by the consent rule, that the costs should abide the event of the issue, the court directed the *whole* costs to be paid under it^s.

° *Still and Rogers*, 1 Lil. P. R. 344. *Per Holt*, Ch. J. Barnes, 130. 1 Willf. 261. 331. Say. Rep. 24. 1 Willf. 324. S. C.

^p Say. Rep. 229. 1 Bur. 603.

^q Say. Rep. 253.

^r 1 Bur. 604.

^s 2 Bur. 1021.

Having

Having thus shewn, in what cases the parties are entitled to costs, I shall proceed to consider, what costs they are respectively entitled to, how they are taxed, and the means of recovering them, as between *party* and *party*; and shall then conclude, with the respective remedies for the recovery and taxation of costs, as between *attorney* and *client*.

Where the plaintiff recovers *single* damages, he is only entitled to *single* costs; unless more be expressly given him by statute. But if *double* or *treble* damages be given by statute, in a case wherein *single* damages were before recoverable, the plaintiff is entitled to *double* or *treble* costs, although the statute be silent respecting them¹; as in an action upon the 2 Hen. 4. c. 11. &c.² In some cases, *double* and *treble* costs are expressly given to the plaintiff; as upon the game laws, by the statute 2 Geo. 3. c. 19. § 5. and wherever a plaintiff is entitled to *double* or *treble* costs, the costs

Of *double* and *treble* costs.

¹ Say. Costs, 228.

² *Ante*, 3.

given by the court *de incremento* are to be doubled or trebled, as well as those given by the jury^v. But double or treble costs are not to be understood to mean, according to their literal import, twice or thrice the amount of single costs. Where a statute gives *double* costs, they are calculated thus: 1. the common costs; and then *half* the common costs. If *treble* costs, 1. the common costs; 2. half of these; and then half of the latter^w.

Double or treble costs are also in some cases expressly given to the defendant; as in actions against parish officers, by the 43 Eliz. c. 2. § 19. against justices of the peace, constables, &c. by the 7 Jac. 1. c. 5. for distresses for rents and services, by the 11 Geo. 2. c. 19. § 21, 2. and against officers of the excise or customs,

^v 2 Leon. 52. Cro. Eliz. 582. 3 Lev. 351. Carth. 297. 321. 2 Str. 1048. but see 1 T. R. 252.

^w Table of costs, *in principio*. This table is a valuable acquisition to the profession, as it exhibits a collection of bills of costs, accurately drawn, and methodically arranged; by which the practitioner may not only know how to charge for his business, but may see beforehand in what manner it is to be done.

by

by the 23 Geo. 3. c. 70. § 34. and 24 Geo. 3. sess. 2. c. 47. § 35. In these, and such like cases, where it does not appear, on the face of the record, that the defendant is entitled to the benefit of the act, (as where he pleads the general issue,) and there is no particular mode appointed for recovery of the costs, the proper mode, after a nonsuit or verdict for the defendant, is to apply to the court, upon an affidavit of the facts, for leave to enter a suggestion on the roll^x. And it cannot be done by rule of court^y, unless where the plaintiff moves for leave to discontinue on payment of costs; in which case, the court may make it part of the rule, that he shall pay double or treble costs^z. But where a particular mode is appointed by statute, for the recovery of double or treble costs, as by the *certificate* of the judge who tried the cause, on the 7 Jac. 1. c. 5. there that

^x 1 Str. 49, 50. Cas. Pr. C. B. 16. Cas. Temp. Hardw. 125. *Id.* 138. 2 Str. 1021. S. C. Say. Rep. 214. 3 Will. 442.

^y 1 Str. 50.

^z 2 Str. 974. Cas. Temp. Hardw. 125.

particular

particular mode must be observed ^a: so that if the judge certify, there is no need of a suggestion; and if he do not, it is useless, except where judgment goes by default ^b.

Mode of *taxing* costs, between party and party.

Costs are taxed, as between party and party, by the *master* in the king's bench, or by one of the *prothonotaries* in the common pleas, upon a bill made out by the attorney for the party entitled; or more frequently, without a bill, upon a view of the proceedings: and if there have been any *extra* expences, which do not appear on the face of the proceedings, there should be an affidavit made of such expences, to warrant the allowance of them; which is called an affidavit of *increased* costs ^c. It is usual, among fair practisers, to give notice to the opposite attorney, of the time when the costs are intended to be taxed ^d; but

^a 2 Vent. 45. Doug. *est.* 307, 8. but see Doug. *est.* 308. n.

^b Cas. Temp. Hardw. 132, 9.

^c Imp. K. B. 348.

^d *Id.* 349.

in order to enforce it, there must be a rule to be present at taxing costs: which rule is obtained from the clerk of the rules in the king's bench, or one of the secondaries in the common pleas, and should be duly served; after which, if the costs are taxed without notice, the taxation is irregular, and the attorney liable to an attachment.

The means of recovering costs, as between party and party, are by *action* or *execution*, upon a judgment obtained for them; or by *attachment*, upon a rule of court. Thus, in *ejectment*, where there is a verdict and judgment against the tenant, an action may be brought, or execution taken out thereon, for the costs^c: but where the plaintiff is nonsuited, for not confessing lease entry and ouster, the lessor of the plaintiff must proceed by attachment, upon the consent rule^f. And so where the nominal plaintiff is nonsuited upon the merits, or has a verdict and judgment against him, the only

Means of recovering costs, between party and party.

^c Run. Eject. 140, 141.

^f *Id. ibid.* 1 Salk. 259. Barnes, 182.

remedy

remedy is by attachment, against the lessor of the plaintiff ^g.

In proceeding by *attachment*, a copy of the rule, with the officer's *allocatur* thereon, should be *personally* ^h served, on the party liable to the payment of costs; and at the same time, the original rule should be shewn to him ⁱ, and a demand made of the payment of them ^k: which demand may be made by the acting attorney in the cause, although he act in the name of another attorney ^l. And if the costs be not paid, the court, upon an affidavit of the circumstances, will grant an attachment. In the king's bench, the rule for an attachment is absolute in the first instance ^m; and may be moved for, on the last day of term ⁿ.

Besides the ordinary method of proceeding, there are certain *auxiliary* means

^g Run. Eject. 142, 3. *Tilly and Bailly*, Mich. 6 Geo. 2.

^h 3 T. R. 351.

ⁱ *Id. ibid.*

^k Barnes, 120.

^l Say. Rep. 95.

^m *Per Buller*, Just. M. 24 G. 3.

ⁿ 5 Bur. 2686.

for the recovery of costs, as between party and party. These means are by moving to stay the proceedings, until security be given for the payment of costs, or until the costs are paid of a former action for the same cause; or by deducting the costs of one action, from those of another.

In *ejectment*^o, and actions *qui tam*^p, where the plaintiff, or his lessor, is *unknown* to the defendant, the latter may call for an account of his residence, or place of abode, from the opposite attorney; and if he refuse to give it, or give in a fictitious account, of a person who cannot be found, the court will stay the proceedings, until security be given for the payment of costs. And in *ejectment*, where the lessor of the plaintiff is an *infant*^a, *dead*^r, or resident *abroad*^s, the

Of staying the proceedings, until security be given for payment of costs.

^o 1 Str. 681.

^p *Id.* 697. 705. Barnes, 126.

^a 1 Str. 694. 2 Str. 932. 1206. 1 Willf. 130. Cowp. 24. Barnes, 183. B. N. P. 111. but see Cowp. 128.

^r Barnes, 147.

^s 2 Bur. 1177. Say. Costs, 153.

court

court will stay the proceedings, until a real and substantial plaintiff be named, or some responsible person undertake for the payment of costs. A similar undertaking is also required, in an action for the mesne profits, brought in the name of the nominal plaintiff in ejectment[†].

But except in *ejectment*^u, or actions *qui tam*^v, it was not formerly usual to require security for costs, where the plaintiff resided abroad^w: for it was considered, that such a proceeding might affect trade, by excluding foreigners from our courts; and would be a means of clogging the course of justice. But now, although a plaintiff is not compellable to give security for costs, merely as a foreigner, if he reside in this country, yet whether he be a foreigner or native, if he reside abroad, out of the reach of the process of the court, the proceedings may

[†] Say. Rep. 78.

^u 2 Bur. 1177. Say. Costs, 153.

^v 1 Str. 697. 2 Str. 1206. 1 Willf. 266.

^w 2 Str. 1206. 1 Willf. 266. Say. Costs, 155. 2 Bur. 1026. 4 Bur. 2105. Cowp. 24. 158.

be stayed, till his return, or security be given for the payment of costs^x. These are the only grounds upon which the proceedings can be stayed, for want of security for costs: it being holden, that they shall not be stayed, even in a *qui tam* action, merely on account of the plaintiff's poverty^y; or in *ejectment*, where the lessor of the plaintiff is known, of full age, and resident in this country^z.

In a *second* ejectment, the court will stay the proceedings, until the costs are paid of a prior one, for the same cause^a; and that whether it be brought in the same or a different court^b. And where the defendant in ejectment brings a writ of error, before he has quitted possession, the court will stay the proceedings, pending the writ of error^c. But the

Of staying the proceedings, until payment of costs of a former action.

^x 1 T. R. 267. 362. 491.

^y Cowp. 24. Barnes, 126. ^z 1 T. R. 491.

^a 1 Salk. 255. 1 Str. 548. 554. 2 Str. 1152. 1206.

¹ T. R. 492. K. B. Pr. Reg. 174. Barnes, 133.

² Blac. Rep. 304. 1158. 1180. C. B.

^b *Id. ibid.*

^c 1 Salk. 258, 9. and see 1 Str. 554.

vexation of the party is said to be the ground of these rules^d: and therefore, if the second ejectment be brought by the defendant, or there appears to be no vexation, the court will not make a rule for staying the proceedings, until the costs are paid of the former ejectment^e.

In other cases, it was not formerly usual to stay the proceedings, in a second action, until the costs were paid of a prior one, for the same cause^{*}; and particularly, if the merits did not come in question, on the former trial^f. But of late years, it has been done, in several instances, on the ground of vexation^g: and in one case^h, where an action was brought by husband and wife, the court stayed the proceedings, until the pay-

^d 4 Mod. 379. 2 Str. 1152.

^e 4 Mod. 379. 1 Str. 681. 2 Str. 1099. 1121. Barnes, 180.

^{*} 2 Str. 1206. Cowp. 322. 1 T. R. 491, 2. K. B. Barnes, 125. C. B. but see 1 Vent. 100.

^f 1 Ld. Raym. 697.

^g 2 T. R. 511. K. B. Say. Costs, 245. 247. 2 Blac. Rep. 741. 3 Will. 149. S. C. C. B.

^h *Lampley & wife v. Sands*, H. 25 G. 3. K. B.

ment of costs in a former action, at the suit of the husband only; it being for the same demand.

The practice of deducting or setting off the costs in one action against those in another, however agreeable to natural justice, does not seem to have obtained, till lately, in the court of king's bench^k. But, in the court of common pleas, it has been frequently allowed; and that not only where the parties have been the *same*^l, but also where they have been in some measure *different*. Thus a party has been permitted to set off a *separate* demand, for costs payable to himself *alone*, against a *joint* demand, for costs payable by himself and others^m: and he has also been permitted to set off a *joint* demand, for costs payable to himself and another, against a *separate* demand, for damages and costs payable by himself

Of setting off costs against costs.

^k 2 Str. 891. 1203. E. N. P. 336. 4 T. R. 124.

^l Barnes, 145. 2 Blac. Rep. 826. E. N. P. 336.

^m Barnes, 146. but see Barnes, 130.

onlyⁿ. But where, in an action of trespass against four defendants, the plaintiff obtained a verdict against one, and the other three were acquitted, the court would not suffer the costs of the three defendants, who were acquitted, to be deducted out of the plaintiff's costs, against that defendant who was found guilty; declaring the motion to be unprecedented^o.

Where the application is made by the party to whom the *larger* sum is due, the rule is for a stay of proceedings, on acknowledging satisfaction for the *lesser* sum^p. But where the *lesser* sum is due to the party applying, the rule is to have it deducted, and for a stay of proceedings, on payment of the balance^q.

Remedies for the recovery and taxation of costs, as between attorney and client.

As between *attorney* and *client*, the former may maintain an action against

ⁿ Say, Costs, 254. 2 Blac. Rep. 827. S. C. cited.

^o Barnes, 145. B. N. P. 336.

^p B. N. P. 336.

^q Say, Costs, 254. and see 4 T. R. 124.

the latter, for the recovery of his costs^r. But, by the statute 3 Jac. 1. c. 7. § 1. "all attornies and folicitors shall give a true bill unto their masters or clients, or their assigns, of all charges concerning the suits which they have for them, subscribed with their hands and names, before such time as they or any of them shall charge their clients, with any the same fees or charges." Upon this statute it was a good plea, to an action brought by an attorney for his fees, that no bill had been delivered to the defendant^s; or the statute might have been given in evidence, on *non assumpsit*^t. But if an attorney had delivered his bill to the defendant, after the arrest and before the bill filed, it was well enough^u: and this statute did not extend to attornies in *inferior* courts, but only to those in the courts at Westminster^v. It

^r Cro. Car. 159, 160.

^s 3 Keb. 118. 514. T. Raym. 245. 3 Salk. 19. S. C. but see Carth. 57. 1 Show. 48. Comb. 126. S. C.

^t 1 Show. 338.

^u 1 Lil. P. R. 145. but see 1 Str. 633. Cas. Pr. C. B. 27. S. C.

^v Carth. 147. 1 Show. 96. 1 Salk. 86. S. C.

Delivery of
bill of costs.

should also seem, that an attorney's bill could not have been taxed, unless an action was depending thereon, nor without bringing the amount of it into court. To remedy these manifold inconveniences, it was enacted, by the statute 2 Geo. 2. c. 23. § 23. (made perpetual by the 30 Geo. 2. c. 19. § 75.) that "no *attorney* of the court of king's bench, common pleas, or exchequer, &c. nor any *solicitor* in chancery, &c. shall commence or maintain any action or suit, for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more, after such attorney or solicitor respectively shall have delivered, unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements", written in a common legible hand, and in the English tongue, except law terms and names of writs, and in words at length, except times and

" Barnes, 243. *Id.* 123-

fums;

sums; which bill shall be subscribed, with the proper hand of such attorney or solicitor respectively.

“ And, upon application of the party Taxing it.
or parties chargeable by such bill, or of any other person in that behalf authorized, unto the lord high chancellor, or master of the rolls, or unto any of the courts aforesaid, or unto a judge or baron of any of the said courts respectively, in which the business contained in such bill, or the greatest part thereof in amount or value, shall have been transacted; and upon the submission of the said party or parties, or such other person authorized as aforesaid, to pay the whole sum, that upon taxation of the said bill shall appear to be due, to the said attorney or solicitor respectively; it shall and may be lawful for the said lord high chancellor, master of the rolls, or any of the courts aforesaid, or for any judge or baron of any of the said courts respectively, and they are hereby required, to refer the said bill, and the said attorney's or solicitor's demand thereupon, although no action

or suit shall be then depending in such court, touching the same, to be taxed and settled by the proper officer of such court, without any money being brought into the said court for that purpose : and if the said attorney or solicitor, or the party or parties chargeable by such bill respectively, having due notice, shall refuse or neglect to attend such taxation, the said officer may proceed to tax the said bill *ex parte* ; pending which reference and taxation, no action shall be commenced or prosecuted, touching the said demand.

Payment of
the balance.

“ And, upon the taxation and settlement of such bill and demand, the said party or parties shall forthwith pay to the said attorney or solicitor respectively, or to any person by him authorized to receive the same, that shall be present at the said taxation, or otherwise unto such other person or persons, or in such manner, as the respective court aforesaid shall direct, the whole sum that shall be found to be or remain due thereon, which payment shall be a full discharge
of

of the said bill and demand : and in default thereof, the said party or parties shall be liable to an attachment or process of contempt, or to such other proceedings, at the election of the said attorney or solicitor, as such party or parties was or were before liable unto.

“ And if, upon the said taxation and settlement, it shall be found, that such attorney or solicitor shall happen to have been overpaid, then the said attorney or solicitor respectively shall forthwith refund, and pay unto the party or parties entitled thereunto, or to any person by him, her, or them authorized to receive the same, if present at the settling thereof, or otherwise unto such other person or persons, or in such manner, as the respective court aforesaid shall direct, all such money as the said officer shall certify to have been so overpaid ; and in default thereof, the said attorney or solicitor respectively shall, in like manner, be liable to an attachment or process of contempt, or to such other proceedings, at the election of the said party or parties,

Refunding
money over-
paid.

ties, as he would have been subject unto, if this act had not been made.

Costs of taxation.

“ And the said respective courts are hereby authorized, to award the *costs* of such *taxations* to be paid by the parties, according to the event of the taxation of the bill; that is to say, if the bill taxed be less, by a *sixth* part, than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less, the court, in their discretion, shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bill.”

Abbreviations.

But, by the 12 Geo. 2. c. 13. § 5. “ it shall and may be lawful to and for every attorney, clerk in court, and solicitor, to write his bill of fees, charges, and disbursements, with such *abbreviations* as are now commonly used in the English language; any thing in any former law to the contrary notwithstanding.”

And by § 6. “ the said act of the *second* year of his present majesty, for the

better regulation of attornies and solicitors, or any clause, matter, or thing therein contained, shall not extend to any bill of fees, charges, and disbursements, due from any attorney or solicitor, to any other attorney or solicitor, or clerk in court; but that every such attorney, solicitor, or clerk in court, may use such remedies for the recovery of his fees, charges, and disbursements, against such other attorney or solicitor, as he might have done before the making of the said act."

Upon the latter clause, there is a case in *Wilson**, where a judge of the court of king's bench having made an order, to refer an *agent's* bill to be taxed, and the master not having obeyed it, the court was applied to, and held that the order was irregular; the master declaring, that he had never taxed a bill for agency. But it is now the uniform practice of both courts^y, to refer an agent's

In what cases an attorney's bill may be taxed, by his client.

* 1 Will. 266.

^y Doug. *ad.* 199, 200. and the cases there cited *in utris.*

bill to be taxed, upon the defendant's bringing into court the sum claimed by the plaintiff. It is not necessary however, that such a bill should be signed, or delivered, before the commencement of an action ^a.

If the whole bill be for *conveyancing* ^a, or for business done at the quarter *sessions* ^b, &c. it cannot be taxed. But where an attorney had delivered two separate bills, one of which was for fees and disbursements in causes, and the other for making conveyances, a rule was made for taxing both ^c. And so, where it was moved, that the master might be directed to tax those articles in an attorney's bill, which related to conveyancing and parliamentary business, the rest being for management of causes in the court of king's bench, lord *Mansfield* said, there was no doubt but the master might tax the whole : that he recollected a case,

^a Doug. 607. 199. *in notis*.

^a M. 12 G. 2. *Anon.* K. B. Barnes, 141. 2. C. B.

^b 4 T. R. 124. K. B. Barnes, 122. C. B.

^c 5 My. Rep. 233. Say. Colls, 320. S. C.

where

where the fees paid to a proctor, for business done in the ecclesiastical court, made part of the bill; and it was determined, that, as the whole bill had been referred to the master, he might tax that part of it ^d.

It is not necessary for the *executor* or *administrator* of an attorney, to deliver a bill of costs, for business done by his testator or intestate, before the commencement of an action ^e; the statute 2 Geo. 2. c. 23. § 23. being confined to actions brought by the attorney himself, and not extending to his personal representatives. And, in the court of common pleas, they 'will not suffer such a bill to be taxed': but in the court of king's bench it is otherwise ^f; for there, the bill may be referred to be taxed, on the defendant's undertaking to pay what is due. An attorney delivered his bill, and, after his death, application was made to tax it, and above a sixth part was taken off;

^d Doug. *off.* 199. *in notis.*

^e Cal. Pr. C. B. 58. ^f Barnes, 119. 122.

^g 2 Str. 1056. Say, Costs, 324, 5. Imp. K. B. 482.

it was moved that the executrix might pay the costs, but the court held she should not, for the words of the act 2 Geo. 2. c. 23. § 23. impose them upon the attorney or solicitor only, and the executrix is not to blame, if she stand upon his bill, or make out one from his books ^h.

After an attorney's bill has been settled and paid, and the payment has been long acquiesced under, the court will not refer it to be taxed, *as a matter of course* ⁱ. So where a bond had been given for the debt, five years before, and the vouchers had been delivered up, the court would not refer the bill to be taxed, saying, an attorney at this rate could never be safe ^k. And it is a general rule, that an attorney's bill cannot be taxed, at the trial of an action brought upon it, nor after verdict ^l; for if the business was really done, (which must be proved

^h 2 Str. 1056. Say. Costs, 127.

ⁱ Say. Costs, 523. Doug. 67. 199.

^k Cal. Pr. C. B. 139. Pr. Reg. 37. S. C.

Doug. 67. 199. K. B. Barnes, 124. C. B.

at the trial,) the delay of the defendant, for more than a month, in objecting to the *quantum*, is an admission that he thinks it to be reasonable. But though an attorney's bill has been settled and paid, yet the court, *under special circumstances*, will refer it to be taxed; for the client may, by affidavit, shew, that the business charged was never performed, or that the charges are fraudulent: and where that is the case, neither payment, nor a release, nor a judgment for the money due, will preclude the court from referring the bill to be taxed^m. It may also be taxed, though there was a special agreement, between the attorney and his client, that the former should be paid for his time, at a certain rate by the day, besides his expencesⁿ; or though he has obtained a warrant of attorney from his client, for confessing judgment for the money due upon his bill, and has entered up judgment thereupon^o.

^m Say. Costs, 323. Doug. *oct.* 197. S. P.

ⁿ Say. Costs, 321. ^o *Id.* 322.

The statute 2 Geo. 2. c. 23. § 23. only requires the delivery of a bill, for the *bringing* of an action; and therefore, though an attorney cannot bring an action on his bill, till it has been delivered a month, that circumstance is not necessary to enable him to *set it off*. But he must not produce it at the trial by surprise. It is sufficient, in such case, to deliver it time enough, for the plaintiff to have it taxed before the trial ^p.

Mode of taxing an attorney's bill, by his *client*.

If an attorney refuse to deliver a bill to his client, the latter may compel him, by taking out a summons before a judge; and if the attorney, on being served therewith, do not attend, an order will be made for delivering it, within a reasonable time ^q. If he still neglect to deliver it, the order should be made a rule of court; and on serving the same, and making affidavit thereof, the court on motion will grant an attachment ^q. The bill being delivered, the client may apply

^p Doug. *oct.* 199. *in notis*.

^q Imp. K. B. 479.

for a judge's summons, to shew cause, why it should not be referred to the proper officer to be taxed; upon which an order will be made, the client undertaking to pay what shall appear to be due upon such taxation'. If the attorney do not attend, an order will be made of course. But the client cannot have a summons for delivery of the bill, and taxing it, together^s. It was formerly necessary, in the king's bench, to have three appointments, in case the attorney did not attend, before the master could proceed *ex parte*. But, by a late rule^t, it is ordered, that "on every appointment to be made by the master, the party on whom the same shall be served, and required to attend, shall attend such appointment, without waiting for a second; or in default thereof, the master shall proceed *ex parte* on the first appointment."

If a sixth part of the bill be taken off, the attorney is to pay the costs of tax-

Of the *costs*
of taxation.

^r Imp. K.B. 479, 480. ^s *Id.* 480. Barnes, 126. C.B.

^t H. 32 Geo. 3. 4 T. R. 580.

ation;

ation; but if less, the costs are in the discretion of the court^v. In the exercise of this discretion, however, the courts are governed by the statute: and accordingly, the costs of taxation have been always reciprocally given to the client or attorney, as a sixth part has, or has not been taken off^w.

Of an attorney's *lien* for his bill of costs.

To assist the attorney, in recovering his costs, he has a *lien* for the amount of his bill, upon the deeds, papers, and writings in his hands, belonging to his client^x: and until that be paid, the court will not order them to be delivered up^y. Nor can an attorney be *changed* by his client, without leave of the court, or order of a judge, on payment of his bill, to be taxed by the proper officer^z. An attorney has also a *lien*, on the money recovered by his client, for his bill of costs^z. If the money come to his hands, he may retain it, to the amount of his

^v See the statute.

^w Barnes, 118. 147, 8.

^x 4 T. R. 124. Doug. *est.* 104, 5. but see *Id.* 197. n.

^y 1 Lil. P. R. 142. 3 T. R. 275.

^z 1 Lil. P. R. 141. Doug. *est.* 217.

^z 4 T. R. 124.

bill: he may stop it *in transitu*, if he can lay hold of it: if he apply to the court, they will prevent its being paid over, till his demand is satisfied^a. And lord *Mansfield* declared he was inclined to go still further, and to hold, that if the attorney give notice to the defendant, not to pay the money recovered by his client, till his bill be satisfied, a payment by the defendant, after such notice, would be in his own wrong, and like paying a debt which has been assigned, after notice^b. So, in a late case^c, where the defendant applied to set off the debt and costs in one action, against those in another, the court would not suffer it to be done, until the attorney's bill was first discharged. But the court will not go beyond these limits. And therefore where the defendant, not having had any notice to the contrary, compromised the debt and costs with the plaintiff, before his attorney had been paid, the court would not oblige the defendant to pay him^d.

^a Doug. 100, 101.

^b *Id.* 226, 7.

^c 4 T. R. 123, 4.

^d Doug. 226.

A D D E N D U M.

IN page 25, a certificate is said to be unnecessary, on the statute 22 & 23 Car. 2. c. 9. where, to a plea of a right of way, there is a replication of *extra viam*. But the contrary was determined, by the court of king's bench, in the case of *Cochran v. Harrison*, T. 22 G. 3. of which the author has been favoured with a manuscript note, since this work was printed off. That was an action of trespass *quare clausum fregit*, wherein the defendant pleaded not guilty, and a right of way, set out under an inclosure act, describing it by metes and bounds. To the latter plea, the plaintiff replied *extra viam*; and issue being joined thereon, there was a verdict for the plaintiff, with 30s. damages and 30s. costs. The judge not having certified, the court were unanimously of opinion, that the plaintiff was entitled to no more costs than damages. And *Buller Just.* grounded his opinion on the former determinations being wrong; because, after the replication of *extra viam*, the case was exactly the same, as if not guilty had been originally pleaded; and upon this issue the title could not have come in question.

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